JUN 19 1974

In the Supreme Court of the United States

October Term, 1973

No. 73-1897

MICKEY NOWLIN and
ARLENE NOWLIN,
Petitioners,

vs.

PROFESSIONAL AUTO SALES, INC.,
Respondent,

and

DENNIS C. HENSON,
d/b/a M.W.S. RECOVERY SERVICE,
Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statutory provisions involved	3
Statement of the case	3
Reasons for granting the writ	5
I. — Review by this Court is necessary to resolve important issues of Federal Law.	5
II. — The decision of the United States Court of Appeals is erroneous and in conflict with applicable decisions of this Court.	7
Conclusion	13
Appendices	
A. — Opinion and Judgment of the United States Court of Appeals	App. 1
B. — Opinion and Judgment of the United States District Court	App. 5
C. — Statutes	App. 6

Cases Cited

Adams v. Department of Motor Vehicles, —— CA 3d ——, 113 Cal. Rptr. 145 (1974)	6
Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972); rev'd sub. nom., Adams v. Southern California	

Page

First Nat'l Bank, 492 F. 2d 324 (9th Cir. 1973); reh'g en banc denied March 21, 1974; petition for writ of certiorari filed June 7, 1974, No. 73-1842 ..... 6, 11

Adickes v. S. H. Kress and Company, 398 U.S. 144 (1970) 9

Bichel Optical Laboratories v. Marquette National Bank, 487 F. 2d 906 (8th Cir. 1973) 6

Blye v. Globe-Wernicke Realty Co., 347 N.Y.S. 2d 170, 300 N.E. 2d 710 (1973) 6

Boland v. Essex County Bank and Trust, 361 F. Supp. 917 (D. Mass., 1973) 6

Bond v. Dentzer, 479 F. 2d 302 (2nd Cir. 1974).. (2nd Cir., March 13, 1974) 6

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 8

Dielen v. Levine, 334 F. Supp. 823 (D. Neb. 1972) 6

Evans v. Abney, 396 U.S. 435 (1970) 9

Evans v. Newton, 382 U.S. 296 (1966) 9, 12

Exton v. Michigan Fidelity Loan, No. G36-72 (W.D. Mich. 1972) 6

Ford v. Dean's O.K. Tire Store, 2 CCH Pov. L.Rep. 16, 856 (D.Nev. Feb. 9, 1973) 6

INDEX—Continued

	Page
Gibbs v. Titleman, 369 F. Supp. 38 (E.D. Pa. 1973), appeal docketed No. 74-1062 (3rd Cir. Jan. 15, 1974)	6
Hall v. Garson, 430 F. 2d 430 (5th Cir. 1970); 468 F. 2d 845 (5th Cir. 1972)	6
Hernandez v. European Auto Sales, 487 F. 2d 378 (2nd Cir. 1973)	6
Holt v. Brown, 336 F. Supp. 2 (W.D. Ky. 1971)	6
Jackson v. Metropolitan Edison Company, 483 F. 2d 754 (3rd Cir. 1973), cert. granted, —— U.S. ——, 94 S.Ct. 1407 (1974)	7
James v. Pinnex, No. 72-1250 —— F. 2d ——, No. 73-1866 (5th Cir., June 10, 1974)	6
Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970).	6
Kruger v. Wells-Fargo Bank, —— Cal. 3d ——, —— Cal.Rptr. —— (April 26, 1974)	6
Lee v. Cooper, No. 74-104 (D.N.J. March 21, 1974)	6
Lombard v. State of Louisiana, 373 U.S. 267 (1963)	9
Marsh v. Alabama, 326 U.S. 502 (1946)	9
Mason v. Garris, 360 F. Supp. 420 (N.D. Ga. 1973)	6
McCabe v. Atchinson, Topeka & Santa Fe R. Company, 235 U.S. 151 (1914)	9

INDEX—Continued

	Page
McQueen v. Lambert, 348 F. Supp. 1334 (M.D. Fla. 1972)	6
Michel v. Rex-Noreco, No. 6729 (D.Vt. 1972)	6
Mitchell v. W. T. Grant Co., —— U.S. ——, 42 U.S.L.W. 4671 (May 13, 1974)	2, 5, 12, 13
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)	8, 9
Nichols v. Tower Grove Bank, —— F. 2d ——, No. 73-1621 (8th Cir. May 13, 1974)	6
Nixon v. Condon, 286 U.S. 73 (1932)	8, 9
Payne v. Walden, 190 S.E. 2d 770 (W.Va. 1972)	6
Peterson v. City of Greenville, 373 U.S. 244 (1963)	9
Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952)	8
Reitman v. Mulkey, 387 U.S. 369 (1967)	8, 9
Robinson v. Florida, 378 U.S. 153 (1964)	9
Shelley v. Kraemer, 334 U.S. 1 (1948)	9
Shirley v. State National Bank, 493 F. 2d 739 (2nd Cir. 1974), petition for rehearing en banc denied, —— F. 2d —— (2nd Cir. March 29, 1974)	6
Smith v. Allwright, 321 U.S. 649 (1944)	8, 9

INDEX—Continued

	Page
Sniadach v. Family Finance Co., 395 U.S. 337 (1969)	5
Straley v. Gassaway Motor Co., Inc., 359 F. Supp. 902 (S.D. W.Va. 1973)	6
Terry v. Adams, 345 U.S. 461 (1953)	8, 9
Turner v. Impala Motors, No. C-73-50 (W.D. Tenn. 1973) appeal docketed, No. 73-1836 (6th Cir. Aug. 15, 1973)	6
United States v. Guest, 383 U.S. 745 (1965)	12
United States v. Price, 383 U.S. 787 (1965)	12
United States v. Williams, 341 U.S. 97 (1950)	9, 12
Western v. Hodgson, 359 F. Supp. 194 (S.D. W.Va. 1973)	6

Text Cited

Clark and Landers, Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution, 59 Va.L.Rev. 355 (1973)	6

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October Term, 1973

No. _____

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ARLENE NOWLIN,
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PROFESSIONAL AUTO SALES, INC.,
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and

DENNIS C. HENSON,
d/b/a M.W.S. RECOVERY SERVICE,
Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, Mickey Nowlin and Arlene Nowlin respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in these proceeding on April 25, 1974.

OPINION BELOW

The opinion of the United States Court of Appeals, not yet reported, is attached hereto as Appendix A. The opinion of the United States District Court for the District of Nebraska in *Mickey Novelin and Arlene Novelin vs. Professional Auto Sales, Inc.*, unreported, is attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 25, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the unilateral taking of debtor's property by secured creditors through Nebraska's comprehensive statutory scheme, promoting significant interests governing repossessions, so significantly involves the state in the procedures followed by secured creditors as to constitute acts under color of state law giving rise to an action under Rev. Stat. §1979, 42 U.S.C. §1983 and "state action" under the Fourteenth Amendment of the United States Constitution.

2. Whether Nebraska's statutory scheme of extra-judicial repossession, which fails to provide any of the procedural protections set down by this Court in *Mitchell v. W. T. Grant Co.*, —— U.S. ——, 42 U.S.L.W. 4671 (May 13, 1974), requiring prior judicial intervention before final

disposition of a debtor's property, violates the due process clause of the Fourteenth Amendment.

STATUTORY PROVISIONS INVOLVED

These statutes are reproduced in Appendix C.

1. United States Constitution, Amendment XIV, §1.

2. United States Code, Rev. Stat. §1979, Title 42 §1983, hereinafter referred to a 42 U.S.C. §1983.

3. Nebraska Uniform Commercial Code, §§9-502, 9-503, and 9-504.

4. Revised Statutes of Nebraska, 1943, §§60-111; 69-109 and 69-110.

5. Revised Statutes of Nebraska, 1972 Supplement, §§60-1401.01; 60-1402; 60-1406; 60-1411.01; 60-1411.02; 60-1411.03; and 60-1419.

STATEMENT OF THE CASE

On May 26, 1972, petitioners, husband and wife, purchased a 1967 Plymouth Belvedere automobile from respondent, Professional Auto Sales, Inc., an Omaha used car dealership. Petitioners agreed to purchase the vehicle for $900 and were given a $500 trade-in-allowance on a 1966 Ford station wagon. The respondent required the Nowlins to execute a contract, conforming to Nebraska law, providing for payments of $15 per week until the $400 balance was paid off.

On June 13, 1972, at 10:00 p.m., in the dark of night, respondent's agent acting pursuant to §9-503 of the Nebraska U.C.C. repossessed the Nowlins' automobile which had been parked in front of their home. The following day, petitioners demanded the return of their automobile but respondent refused. Instead, respondent mailed to petitioners on June 21, 1972, a full eight days after repossession, an instrument marked "notice of repossession" which asserted the creditor's right under §9-503 to repossess:

> "Pursuant to Nebraska law, you are hereby notified that unless your account with the above listed Professional Auto's Inc. is brought to date by July 1, 1972, the below listed security mortgaged by you to them will be repossessed by them and sold at private sale without further notice.
>
> "THIS IS A FINAL NOTICE!!"

At the time of the repossession and subsequent notice, petitioners had paid over $560 of the original $900 purchase price.

On June 22, 1972, petitioners filed suit in the United States District Court for the District of Nebraska, Petitioners alleged a claim under 42 U.S.C. §1983[1] attacking the constitutionality of Nebraska's repossession statutes, Nebraska Uniform Commercial Code §§9-503 and 9-504. The original action sought damages, injunctive relief, and a declaratory judgment. On June 28, 1972, a temporary restraining order was issued by the district

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1 The jurisdictional basis for the claim was Rev. Stat. §1979, 28 U.S.C. §1343(3) and (4).

court returning possession of the motor vehicle to petitioners. On July 20, 1972, the Court extended the temporary order pending further hearing. On April 4, 1973, the United States District Court dismissed the complaint on the grounds that the court had no subject matter jurisdiction.

On May 3, 1973, petitioners filed a timely notice of appeal to the United States Court of Appeals for the Eighth Circuit. On April 25, 1974, the United States Court of Appeals affirmed the trial court's dismissal, holding that the Nebraska statutory scheme of repossession did not significantly involve the state in the procedures followed by the respondent to constitute an act under color of state law under 42 U.S.C. §1983.

REASONS FOR GRANTING THE WRIT

I.

Review by this Court is necessary to resolve important issues of Federal Law.

Petitioners have challenged Nebraska's statutory scheme which provides for summary seizure of property. These provisions govern summary repossessions without judicial intervention before final disposition of said property as required by this Court in *Mitchell v. W. T. Grant Co.*, —— U.S. ——, 42 U.S.L.W. 4671 (May 13, 1974). That case traces its genesis to this Court's pronouncement in *Sniadach v. Family Finance Co.*, 395 U.S. 337 (1969) declaring pre-judgment garnishment unconstitutional. As a result there has been extensive and widespread federal and state court litigation attacking the constitutionality of various

statutory devices providing for summary seizure of property, Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 Va. L. Rev. 355 (1973). Included in this litigation are numerous challenges to summary repossession provisions of Article Nine of the Uniform Commercial Code.[2]

The ramifications of these cases have extended to other areas including attacks on the constitutionality of landlord's liens,[3] garagemen's liens,[4] banker's liens,[5] and wage assignments.[6]

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2 *Adams v. Egley*, 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd sub nom. Adams v. Southern California First Nat'l Bank*, 492 F. 2d 324, (9th Cir. 1973); *reh'g en banc denied* March 21, 1974; *petition for cert. & certiorari filed* June 7, 1974, No. 73-1842; *Bichel Optical Laboratories v. Marquette National Bank*, 487 F. 2d 900 (8th Cir. 1973); *Nichols v. Tower Grove Bank*, — F. 2d —, No. 73-1621 (8th Cir. May 13, 1974); *Shirley v. State National Bank*, 493 F. 2d 739, (2nd Cir. 1974); *petition for rehearing en banc denied*, — F. 2d —, — 2nd Cir. March 29, 1974); *Gibbs v. Titelman*, 369 F. Supp. 38 (E.D. Pa. 1973); *appeal docketed* No. 74-1062 (3rd Cir. Jan. 15, 1974); *Turner v. Impala Motors*, No. C-73-50 (W.D. Tenn. 1973); *appeal docketed* No. 73-1826 (6th Cir. Aug. 15, 1973); *James v. Power*, — F. 2d —, — No. 73-1800 (5th Cir. June 10, 1974); *Boland v. Essex County Bank & Trust*, 361 F. Supp. 917 (D. Mass. 1973); and *Michel v. Key Novice*, No. 6729 (D. Vt. 1972).

3 *Hall v. Garson*, 430 F. 2d 430 (5th Cir. 1970); 468 F. 2d 845 (5th Cir. 1972); *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970); *Dielen v. Levine*, 334 F. Supp. 823 (D. Neb. 1972); *Holt v. Brown*, 336 F. Supp. 2 (W.D. Ky. 1971); *MacQueen v. Lambert*, 348 F. Supp. 1334 (M.D. Fla. 1972); *Payne v. Walden*, 190 S.E. 2d 770 (W. Va. 1972); and *Blue v. Globe Wernicke Realty Co.*, 347 N.Y.S. 2d 170, 300 N.E. 2d 710 (1973) among other cases.

4 *Hernandez v. European Auto Sales*, 487 F. 2d 378 (2nd Cir. 1973); *Mason v. Garris*, 360 F. Supp. 420 (N.D. Ga. 1973); *Ford v. Dean's O.K. Tire Store*, 2 C.C.H. Pov.L.Rep. 16, 85e (D. Nev. Feb. 9, 1973); *Adams v. Department of Motor Vehicles*, — CA. 3d —, 113 Cal Rptr. 145 (1974) and *Straley v. Cassaway Motor Co., Inc.*, 359 F. Supp. 902 (S.D. W.Va. 1973); *Lee v. Cooper*, No. 74-104 (D. N.J. March 21, 1974) among other cases.

5 *Krasco v. Wells Fargo Bank*, — Cal. 3d —, — Cal Rptr. — (April 26, 1974); *Bichel Optical Laboratories v. Marquette National Bank*, *supra*.

6 *Bond v. Dentzer*, 494 F. 2d 302 (2nd Cir. 1974); *Western v. Hodgson*, 359 F. Supp. 194 (S.D. W. Va. 1973); *Exton v. Michigan Fidelity Loan*, No. C36-72 (W.D. Mich. 1972).

The cases cited represent a variety of decisions in which courts have either found a supposed absence of state action or determined that the challenged statutes violated constitutional guarantees. They do not delineate meaningful state action standards which are applicable to the numerous statutory grants of power to private persons to seize property.

This Court has acknowledged the importance of these state action and due process issues in the case of *Jackson v. Metropolitan Edison Company*, 483 F. 2d 754 (3rd Cir. 1973), *cert. granted*, —— U.S. ——, 94 S. Ct. 1407 (1974). The *Jackson* case involves the practice of a publicly regulated utility company of terminating consumers' utility service outside the judicial process. The issues of state action and due process are present in *Jackson*, as they are in this case, however, the context is different. Petitioners present a controversy which allows the Court to provide a fuller inquiry into the issues raised by a variety state action cases, and for this reason the petition should be granted. In addition, by setting this case for oral argument with *Jackson*, the Court will have an opportunity to explore the complete range of "state action" cases involving denial of due process and thereby render decisions which will set out a comprehensive, principled guide in this area.

II.

The decision of the United States Court of Appeals is erroneous and in conflict with applicable decisions of this Court.

This case involves a comprehensive statutory scheme which significantly involves the State of Nebraska in the objectionable conduct of secured creditors in repossessing a debtor's automobile. In previous decisions this Court has carefully analyzed the relationship between the state and supposedly private acts to determine the applicability of the provisions of the Constitution. These cases evidence an inquiry into the significance of the state interests and policies that intrude upon private relationships in such a way that the private parties by their particular actions reflect the state policy. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

The state action decisions by this Court reflect a central theme arrived at after a process of "sifting and weighing circumstances"[7] which may be stated as follows:

> "State action is present where a comprehensive statutory framework reflects and introduces state policy into the relationship between private parties so as to define and govern their conduct and give those actions the force of law.

From a review of the state action decisions of this Court, it becomes clear that this central theme emerges in matters

1) involving private parties whose conduct is subjected to pervasive state regulation;[8]

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7 *Burton, supra*, 365 U.S. at 722.

8 *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952); *Burton v. Wilmington Parking Authority, supra*; *Moose Lodge No. 107 v. Irvis, supra*; *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953); and *Nixon v. Condon*, 286 U.S. 73 (1932).

2) where private action consists of the performance of traditionally public functions which have been delegated to private individuals;[9]

3) where private action was encouraged or compelled by state law and was reflected in current state policy;[10] and

4) where there is private action taken in reliance upon state law, custom or usage.[11]

The State of Nebraska has by statute developed a framework for secured transactions which so significantly involves the state in the act of repossession as to make the state a virtual partner in respondent's taking of petitioners' automobile.

A brief examination of the pertinent statutes reveals the existence of such a partnership. The provisions of Article Nine of the Nebraska Uniform Commercial Code establish repossession as the cornerstone of a secured transaction framework which guarantees protection to creditors in the event of default and sets out the step by step process to be followed. The creditor alone may determine when a default has occurred. §9-502 Nebraska U.C.C. He is then authorized to accelerate the balance due

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9 *Evans v. Newton*, 382 U.S. 296 (1966); *Marsh v. Alabama*, 326 U.S. 502 (1946); *Smith v. Allwright*, *supra*; *Terry v. Adams*, *supra*; and *United States v. Williams*, 341 U.S. 97 (1950).

10 *Reitman v. Mulkey*, *supra*; *Adickes v. S. H. Kress and Company*, 398 U.S. 144 (1970); *Moose Lodge No. 107 v. Irvis*, *supra*; *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Lombard v. State of Louisiana*, 373 U.S. 267 (1963); *Robinson v. Florida*, 378 U.S. 153 (1964); *Nixon v. Condon*, *supra*; *McCabe v. Atchinson, Topeka & Santa Fe R. Company*, 235 U.S. 151 (1914); *Evans v. Abney*, 396 U.S. 435 (1970); and *Shelley v. Kraemer*, 334 U.S. 1 (1948).

11 *Adickes v. Kress*, *supra*, and *Evans v. Abney*, *supra*.

on the underlying financial obligation, §9-502 Nebraska U.C.C.; and may repossess the secured property so long as the peace is not breached. §9-503 Nebraska U.C.C. After repossession, the creditor is entitled to sell, lease or otherwise dispose of the secured property, but in order to do so he must first send reasonable notification to the debtor of the time and place of any public sale or the time after which any private sale or other intended disposition is to be made. §9-504(3) Nebraska U.C.C. The sale must be "commercially reasonable." §9-504 Nebraska U.C.C.

The proceeds of any repossession sale may first be applied to the creditor's cost of repossession, holding, preparing, and selling the property. §9-504(1)(a) Nebraska U.C.C. The remainder of the sale price is applied to the balance of the underlying financial obligation. §9-504(2) Nebraska U.C.C.

The effect of this statutory scheme is to create a framework for all repossessions, and indeed in addition to the Nebraska U.C.C., collateral statutes supplemented respondent's power and expedited the repossession process:

1. The State of Nebraska by statute has created the Nebraska Motor Vehicle Licensing Board to regulate all aspects of the used car business. This includes issuance and revocation of licenses. §§60-1401.01 and 1402 R.S. Supp. 1972.

2. Respondent is not allowed to do business as a car dealer without a license. §60-1406 R.S. Supp. 1972.

3. Respondent is required to possess a repossessor's license. §60-1411.01 R.S. Supp. 1972.

4. The Nebraska Motor Vehicle Licensing Board has a statutory obligation to investigate and take corrective action in cases of fraudulent repossessions. §60-1411.02 R.S. Supp. 1972.

5. Advertising of a sale of a repossessed motor vehicle is carefully regulated. §60-1411.03 R.S. Supp. 1972.

6. The respondent must post a $10,000 bond to secure performance of all statutory provisions relating to him and restrictions placed on his license. §60-1419 R.S. Supp. 1972.

7. The clerk of each county is required to expedite the transfer of title of repossessed motor vehicles to secured creditors upon the unilateral declaration of a default. §60-111 R.R.S. 1943.

8. Criminal felony statutes preclude any sale or transfer by the debtor of personal property pledged as security or the taking of property by the debtor out of the county where the property is situated. §69-109 and 110 R.R.S. 1943.

The foregoing statutes reflect the significant interest of the state in the retail sales, financing, and subsequent relationship of the parties to the sale of a motor vehicle.[12]

12 "The Legislature finds and determines that the distribution and sales of motor vehicles . . . in the State of Nebraska vitally affects the general economy of the state, the public interest, the public welfare, and public safety, and that in order to promote the public interest and the public welfare and in the exercise of its police power, it is necessary to regulate motor vehicle . . . dealers . . . distributors, and their representatives doing business in the State of Nebraska . . ." §60-1401.01 R.S. Supp. 1972.

See also the dissenting opinion of Circuit Judge Hufstedler in the denial of rehearing *en banc* in *Adams v. Southern California 1st Nat'l Bank*, *supra*, recognizing the significant governmental interests and policies promoted by a similar statutory scheme.

Through this statutory scheme the state has delegated specific governmental functions to secured creditors to further traditionally state managed interests. The secured creditor has been designated both a judge and a constable in that he is the sole arbitrator of disputes relating to default and is empowered with authority to seize and sell the personal property in the possession of another person in execution of his own judgment. When the state thus abdicates its traditional role, the conduct of ostensibly private persons may retain all the characteristics of an act of a state, *Evans v. Newton*, 382 U.S. 296, 299 (1966); cf., *United States v. Williams, supra; United States v. Guest*, 383 U.S. 745 (1965); and *United States v. Price*, 383 U.S. 787 (1965).

Petitioners' analysis demonstrates that there exists in Nebraska a comprehensive statutory scheme which puts into effect significant and traditional interests of the state through delegation of the power of the state to private persons. Actions by private persons have the force of law and as a result warrant constitutional scrutiny by this Court.

The repossession statutes, §9-503 and 504 of the Nebraska Uniform Commercial Code are clearly unconstitutional when analyzed in conjunction with the guidelines of this Court in *Mitchell v. W. T. Grant, supra.*

The statutory provisions in *Mitchell* require that an action be filed in a Louisiana Court, affording the debtor an opportunity for a hearing at some point before final resolution of the action. 42 U.S.L.W. at 4672. The Louisiana judge in issuing the writ makes his determination

on the specific showing of the "existence of the debt, the lien, and the delinquence." 42 U.S.L.W. at 4674. The Louisiana sequestration statute under scrutiny in *Mitchell* also requires:

1. A verified petition or affidavit by the creditor showing the existence of a debt, lien, and delinquency. 42 U.S.L.W. at 4673.

2. A showing before a judge. *Id.*

3. The posting of a bond by the creditor to protect the debtor, before a writ will issue. *Id.*

4. An immediate hearing upon debtor's request to consider dissolving the writ with the burden of proof resting on the creditor. *Id.*

5. The debtor to regain possession of the property by posting a bond of his own. *Id.*

This procedure, which has been approved by this Court in *Mitchell*, when applied to the repossession statutes in Nebraska compels a finding that the clandestine seizure of petitioners' property by the respondent in the dark of night violates the most basic concept of due process of law.

CONCLUSION

For the reasons stated above, petitioners pray this

Court grant a writ of certiorari to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 73-1348 and 73-1450

Mickey Nowlin and Arlene Nowlin,
Appellants,

v.

Professional Auto Sales, Inc.,
Appellee,

and

Dennis Henson, d/b/a M.W.S. Recovery Service,
Intervenor

Appeal from the United States District Court
for the District of Nebraska

No. 73-1450

LeRoy Mayhugh,
Appellant,

v.

Bill Allen Chevrolet Co. and General Motors Acceptance Corp.,
Appellees

App. 2

Appeal from the United States District Court
for the Western District of Missouri

Submitted: November 14, 1973

Filed: April 25, 1974

Before LAY and HEANEY, Circuit Judges, and HARPER, Senior District Judge.*

PER CURIAM

These two cases were consolidated for argument. In each, the issue on appeal is whether the self-help repossession of plaintiffs' motor vehicles, after plaintiffs defaulted on payment contracts which provided for such repossession, were acts under color of state law, thus creating a cause of action under 42 U.S.C. §1983. Plaintiffs' contentions are that enactment of §§9-503 and 9-504 of the Nebraska Commercial Code and §§400.9-503 and 400.9-504 of the Missouri Commercial Code, which authorize self-help repossession, constitute sufficient state involvement to invoke the jurisdiction of the federal courts.

In each case, the district court dismissed the complaint for lack of subject matter jurisdiction, finding that there was no state action. We affirm both judgments.

The facts in the *Nowlin* case need only brief recitation. Plaintiff Nowlin purchased a 1967 Plymouth automobile from defendant Professional Auto Sales. After receiving a $500 trade-in allowance, Nowlin signed an installment sales

* The Honorable Roy W. Harper, United States Senior District Judge, Eastern and Western Districts of Missouri, sitting by designation.

contract for the balance due. When Nowlin defaulted on the payments, defendants, without prior notice or hearing, took the automobile from its parking place in front of Nowlin's home. After defendants refused Nowlin's request to return the automobile, plaintiff Nowlin brought this action, claiming an unconstitutional taking of his property without due process of law.

In the *Mayhugh* case, the facts are basically similar. In October, 1970, Mayhugh purchased a 1970 Chevrolet truck from defendant Bill Allen Chevrolet. Mayhugh traded in a 1969 Plymouth automobile and paid $500.00 in cash. For the balance due, Mayhugh signed an installment sales contract. Defendant Bill Allen Chevrolet assigned this contract to defendant General Motors Acceptance Corporation. Mayhugh made no payments on the contract after November, 1971. During that month, Mayhugh delivered the truck to Bill Allen Chevrolet for repair of the frame, which had become cracked. Allen Chevrolet offered to repair the truck, but Mayhugh refused the type of repair offered. Mayhugh instead demanded replacement or repurchase of the truck by Allen Chevrolet, and threatened legal action if his demand was not met. Mayhugh refused to accept redelivery of the repaired truck. On December 14, 1971, defendant General Motors Acceptance Corporation repossessed the truck for failure to keep up with the payments. At the time of repossession, the truck was parked on the lot of Bill Allen Chevrolet, where plaintiff had delivered it after discovering the cracked frame.[1]

1 Because of these facts, the district court in *Mayhugh*, after first finding no significant state involvement, held alternatively that relief should be denied because Mayhugh had voluntarily abandoned his possessory rights in the truck by rejecting it "in preparation for a suit for damages for breach of the sale agreement, including return of the purchase price." In view of our affirmance on the jurisdictional issue, we have no occasion to consider this alternative holding.

Mayhugh then filed this suit, alleging violation of his due process rights under color of state law.

Recently, in *Bichel Optical Laboratories v. Marquette National Bank*, 487 F. 2d 906 (8th Cir. 1973), we had occasion to consider the issue presented here. The court there held that:

> [T]he State of Minnesota by the mere passage of the Article 9 "self-help" remedies has not so significantly involved itself in the procedures followed by appellee bank as to constitute an act under color of state law giving rise to a §1983 action, *Bichel, supra* at 907.

We adhere to that view in the present cases, *Fuentes v. Shevin*, 407 U.S. 67 (1972), is clearly distinguishable. As we noted in *Bichel*, while *Fuentes* involved the pre-judgment seizure of goods by a state agent pursuant to a writ of replevin, the procedures challenged in *Bichel* and in the instant cases "involve only private actions arising out of the express written agreements between the parties," *Bichel, supra* at 907. *See also Shirley v. State National Bank*, No. 73-1783 (2d Cir. Feb. 14, 1974); *Adams v. Southern California First National Bank*, No. 72-1484 (9th Cir. Oct. 4, 1973); *Kirsey v. Thelig*, 351 F. Supp. 727 (D. Colo. 1972); *Pease v. Havelock National Bank*, 351 F. Supp. 118 (D. Neb. 1972); *Greene v. First National Exchange Bank*, 348 F. Supp. 672 (W.D. Va. 1972); *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972).

The judgments are affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Civil No. 72-0-322

Mickey Nowlin and Arlene Nowlin,
Plaintiffs,

vs.

Professional Auto Sales, Inc.,
Defendant.

Order

This matter comes before the Court on motion of the defendant to dismiss, on the grounds that the Court has no subject matter jurisdiction over the controversy. Having given due consideration to the arguments and briefs of counsel, the Court finds that the motion should be granted, for the reasons set forth by Chief Judge Urbom in *Pease v. Havelock National Bank*, 351 F. Supp. 118 [D. Neb. 1972].

IT IS THEREFORE ORDERED that this case is hereby dismissed.

Dated this 4th day of April, 1973.

BY THE COURT
ROBERT V. DENNEY
United States District Judge

APPENDIX C

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Nebraska Uniform Commercial Code §9-502(2):

> (2) A secured party who by agreement is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor and who undertakes to collect from the account debtors or obligors must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections. If the security

agreement secures an indebtedness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency. But, if the underlying transaction was a sale of accounts. contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

§9-503:

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably conveneint to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under section 9-504.

§9-504

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the article on Sales (article 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to

the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secured an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type

customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement

or the like and who receives a transfer of collateral fromt he secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article.

Revised Statutes of Nebraska, 1943:

§60-111. Transfer of title by operation of law; new certificate issued; proof required; processing of application. In the event of the transfer of ownership of a motor vehicle by operation of law as upon inheritance, devise or bequest, order in bankruptcy, insolvency, replevin or execution sale, or whenever the engine of a motor vehicle is replaced by another engine, or whenever a motor vehicle is sold to satisfy storage or repair charges, or repossession is had upon default in performance of the terms of a chattel mortgage, trust receipt, conditional sales contract or other like agreement, the clerk of the county in which the last certificate of title to such motor vehicle was issued, upon the surrender of the prior certificate of title or the manufacturer's or importer's certificate, or when that is not possible, upon presentation of satisfactory proof to the county clerk of ownership and right of possession to such motor vehicle, and upon payment of the fee prescribed in this act, and the presentation of an application for certificate of title, may issue to the applicant a certificate of title thereto. Only an affidavit by the person, or agent of the person to whom possession of such motor vehicle has so passed, setting forth facts entitling him to such possession and ownership, together with a copy of the journal entry, court order, or instrument upon which such claim of possession and ownership is founded, shall be considered satisfactory proof of ownership and right of possession. If the applicant cannot produce

such proof of ownership, he may apply directly to the Department of Motor Vehicles and submit such evidence as he may have, and the department may thereupon, if it finds the evidence sufficient, authorize the county clerk to issue a certificate of title. If, from the records in the office of the county clerk, there appear to be any lien or liens on such motor vehicle, such certificate of title shall contain a statement of such liens unless the application is accompanied by proper evidence of their satisfaction or extinction. If the county in which the last certificate of title to such motor vehicle was issued cannot be determined, the application for title shall be processed by the clerk of the county where the court entering the journal entry or order is located or the county where the instrument was executed upon which such claim of possession and ownership is founded, as the case may be.

§69-109. Security interest; personal property; sale or transfer without consent; penalty. Any person who, after having created any security interest in any article of personal property, either presently-owned or after-acquired, for the benefit of another, shall, during the existence of the security interest, sell, transfer, or in any manner dispose of the said personal property, or any part thereof so given as security, to any person or body corporate, without first procuring the consent, in writing, of the owner and holder of the security interest, to any such sale, transfer or disposal, shall be deemed guilty of a felony, and upon conviction thereof shall be fined in any sum not less than one hundred dollars or imprisoned in the Nebraska Penal and Correctional Complex for a term not less than one year nor more than ten years, or be both so fined and imprisoned.

§69-110. Security interest; personal property; removal from county; penalty. Any person who, after having created any security interest in any article of personal property, whether presently-owned or after-acquired, for the benefit of another, shall, during the existence of such interest, remove, permit, or cause to be removed, said property or any part thereof out of the county within which such property was situated with intent to deprive the owner or owners of the security interest of his or their security, shall be deemed guilty of a felony, and upon conviction thereof shall be imprisoned in the Nebraska Penal and Correctional Complex for a term not exceeding ten years, and be fined in a sum not exceeding one thousand dollars.

Revised Statutes of Nebraska, 1972 Supplement:

§60-1401.01. Declaration of intent. The Legislature finds and declares that the distribution and sales of motor vehicles, motorcycles, and trailers in the State of Nebraska vitally affects the general economy of the state, the public interest, the public welfare, and public safety and that in order to promote the public interest and the public welfare and in the exercise of its police power, it is necessary to regulate motor vehicle, motorcycle, and trailer dealers, manufacturers, distributors, and their representatives doing business in the State of Nebraska.

The Legislature further finds that the sales of motor vehicles, motorcycles, and trailers are involved to a large extent in a franchise system established between manufacturers and dealers and hereby declares that the sale of motor vehicles, motorcycles, and trailers to the public in the state under the franchise system includes more than the mere transfer

of title, being a continuing obligation of the manufacturer, distributor and dealer to the buying public affecting the public interest; that the termination or failure of the established relationship between the manufacturer, distributor and dealer without cause or good faith denies to the general buying public its right to availability of continuing post-sale mechanical and operational services and precludes the relationship, expected and implied at the time of sale, between the buyer and the seller necessary to insure safe operating condition of the vehicle.

The Legislature further finds and declares that the distribution and sale of motor vehicles in the state under the franchise system vitally affects commerce, the general economy of the state and the welfare of the citizens of the state requiring the exercise of its police power to insure the public welfare, to regulate commerce, to establish guidelines for enforcement of a fair and equitable balance between parties to such franchises, and to provide judicial relief from unfair and inequitable practices affecting the public interest.

§60-1402(1) reads in pertinent part:

(1) There is hereby established the Nebraska Motor Vehicle Industry Licensing Board

* * *

§60-1406(1)(2) and (8):

Licenses; classes. Licenses issued by the board under the provisions of sections 60-1401 to 60-1419 shall be of the classes hereinafter set out and shall permit the following described business activities:

(1) Motor vehicle dealer's license. This license shall permit the licensee to engage in the business of selling or exchanging new, used, or new and used motor vehicles and trailers as defined in section 60-1401.02, at the established place of business designated in such license and another place or places of business located within three hundred feet of such designated place of business, and within the city or county described in such original license. This license shall permit one person, either the licensee, if he is the individual owner of such licensed business or a stockholder, officer, or co-partner of such licensee to act as a motor vehicle and trailer salesman and the name of such authorized person shall appear on the license;

(2) Motor vehicle, motorcycle, or trailer salesman license. This license shall permit the licensee to engage in the activities of a motor vehicle, motorcycle, or trailer salesman as defined in section 60-1401.02. This license shall permit the one person named thereon to act as a salesman;

* * *

(8) Finance company license. This license, as defined in section 60-1401.02, shall permit the licensee to engage in the activities of repossession of motor vehicles or trailers and the sale of such motor vehicles or trailers so repossessed;

§60-1411.01. Administration; enforcement; fees. To pay the expenses of the administration, operation, maintenance, and enforcement of this act, the board shall collect with each application for each class of license fees not exceeding the following amounts: (1) Motor vehicle dealer's license, ten dollars; (4) motor

vehicle, motorcycle, or trailer salesman's license, three dollars; (9) finance company's license, thirty-five dollars; which fees shall be fixed by the board and shall not exceed the amount actually necessary to sustain the administration, operation, maintenance, and enforcement of this act. Fifteen dollars of the license fee for each dealer's license of any class shall be an inspection fee, and shall not be refunded if the application is denied because of the applicant's failure to meet the requirements of this act. Such licenses, if issued, shall expire on December 31 next following the date of the issuance thereof. Any motor vehicle, motorcycle or trailer dealer changing its location shall not be required to obtain a new license if the new location is within the same city limits or county provided all requirements of law are complied with and a fee of ten dollars is paid, but any change of ownership of any licensee shall require a new application for a license and a new license. Change of name of licensee without change of ownership shall require the licensee to obtain a new license and pay a fee of five dollars. Applications shall be made each year for a new or renewal license.

§60-1411.02. Licensee; investigation. The board may, upon its own motion, and shall, upon a sworn complaint in writing of any person, investigate the actions of any person licensed as a motor vehicle dealer, trailer dealer, motor vehicle or trailer salesman, manufacturer, factory branch, distributor, wholesaler, factory representative, distributor representative, supplemental motor vehicle dealer, wrecker or salvage dealer, finance company, motorcycle dealer or motor vehicle auction dealer. It shall have the power to deny any application for a license or to revoke or suspend any license issued under the provisions of this act when the applicant or licensee including any officer,

stockholder, partner, or any person having any financial interest in the applicant or licensee:

(1) Has had any license, issued to him under the provisions of this act, revoked or suspended and, if the license has been suspended, has not complied with the terms of suspension;

(2) Has knowingly purchased, sold or did business in stolen motor vehicles, motorcycles, or trailers or parts therefor;

(3) Has failed to provide and maintain an established place of business as defined in section 60-1401.02;

(4) Has been found guilty of any felony which has not been pardoned, has been found guilty of any misdemeanor concerning fraud or conversion, or has suffered any judgment in any civil action involving fraud, misrepresentation or conversion; or, in the event felony charges are pending against an applicant, then no license shall be issued to an applicant until there has been a final determination of the charges;

(5) Has made a false material statement in his application or any data attached thereto;

(6) Has willfully failed to perform any written agreement with any consumer or retail buyer;

(7) Has made a fraudulent sale, transaction, or repossession, or created a fraudulent security interest, as defined in the Uniform Commercial Code, in a motor vehicle, trailer, or motorcycle;

(8) Has failed to notify the board of a change in the address of his established place or places of business and in the case of a salesman has failed to notify the board of any change in his employment;

(9) Has willfully failed to deliver to a purchaser a proper certificate of ownership for a motor vehicle, trailer, or motorcycle sold by the licensee;

(10) Has forged the signature of the registered or legal owner on a certificate of title;

(11) Has failed to comply with the provisions of this act and any orders, rules or regulations of the board promulgated under the act;

(12) Has failed to comply with the advertising and selling standards established in section 60-1411.03;

(13) Has failed to comply with the provisions of section 60-320, Chapter 60, article 1, the provisions of this act or rules or regulations promulgated by the board under the provisions thereof; or

(14) Has wilfully defrauded any retail buyer, or other person, in the conduct of the licensee's business.

§60-1411.03 (12) Unauthorized acts. It shall be unlawful for any licensee to engage, directly or indirectly, in the following acts;

* * *

(12) To advertise the words Finance, Loan, Discounts, or others of similar import, in the firm

name or trade style of a person offering motor vehicles, motorcycles and trailers for sale, unless such person is actually engaged in the finance business and offering only bona fide repossessed motor vehicles, motorcycles and trailers; *Provided*, that it is unlawful to use the word Repossessed in the name or trade style of a firm in the advertising of motor vehicles, motorcycles and trailers sold by such a company unless they are bona fide repossessions sold for unpaid balances due only; and *provided further*, that advertisers offering repossessed automobiles for sale must be able to offer proof of repossession;

§60-141º. Dealer's license; bond; conditions. Applicants for a motor vehicle dealer's license, trailer dealer's license, wholesaler's license, or motorcycle dealer's license shall, at the time of making application, furnish a corporate surety bond in the penal sum of ten thousand dollars, and applicants for a motor vehicle auction dealer's license shall at the time of making application furnish a corporate surety bond in the penal sum of one hundred thousand dollars, on a form to be prescribed by the Attorney General of the State of Nebraska. The bond shall provide (1) that the applicant will faithfully perform all the terms and conditions of said license, (2) that the licensed dealer will fully indemnify any person or other dealer by reason of any loss suffered because of (a) the substitution of any motor vehicle or trailer other than the one selected bythe purchaser, (b) the dealer's failure to deliver to the purchaser a clear and marketable title, (c) the dealer's misappropriation of any funds belonging to the purchaser, (d) any alteration on the part of the dealer as to deceive the purchaser as to the year model of any motor vehicle or trailer, and (e) any false and fraudulent representations

or deceitful practices whatever in representing any motor vehicle or trailer, and (3) that the motor vehicle, motorcycle, motor vehicle auction, or trailer dealer or wholesaler shall well, truly, and faithfully comply with all the provisions of his license and the acts of the Legislature relating thereto. The aggregate liability of the surety shall in no event exceed the penalty of said bond.